IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, vs. TYSON FOODS, INC., *et al.* Defendants.	Case No. 05CV0329-GKF-PJC

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S JULY 24, 2009 OPINION AND ORDER [DKT. #2379]

COME NOW Defendants in the above-styled case and respectfully offer the following response in opposition to Plaintiffs' Motion for Reconsideration of the Court's July 24, 2009 Opinion and Order [Dkt. Nos. 2397 and 2443, respectively] ("Motion"), and state as follows:

I. LEGAL STANDARD

Reconsideration of the Court's Order is only justified in the event of: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Plaintiffs have made no claim that the first two factors are relevant in their Motion; therefore it is only the third factor that must be examined.

II. DISCUSSION

A. Plaintiffs' routine motions for reconsideration are contrary to the Federal Rules and waste the resources of the parties and the Court.

Throughout this case, Plaintiffs have engaged in a steady pattern of seeking reconsideration of every decision issued by this Court they perceive to be adverse to their interests, no matter how well-founded and incontrovertible a particular decision may be. *See, e.g.*, *Plaintiffs' Motion to Reconsider the Court's February 26, 2007 Opinion and Order*, Dkt. #1074 (Mar. 8, 2007); *Plaintiffs' Motion for Reconsideration of Order Compelling Discovery*, Dkt. #1153 (May 29, 2007); *Plaintiffs' Motion to Reconsider Amended Scheduling Order*, Dkt. #1386 (Dec. 3, 2007); *Plaintiffs' Motion to Reconsider the Court's Opinion and Order (Dkt. #1463)*, Dkt. #1486 (Jan. 28, 2008); *Plaintiffs' Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order (Dkt. #2362)*, Dkt. #2392 (July 22, 2009); the instant Motion—*Plaintiffs' Motion for Reconsideration of the Court's July 24, 2009 Opinion and Order (Dkt. #2379)*, Dkt. #2443 (Aug. 7, 2009); and *Defendants' Opposition in Response to Plaintiffs' Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order (Dkt. #2362)*, Dkt. #2448 (August 10, 2009).

In fact, this is the second occasion on which Plaintiffs have specifically sought reconsideration of the Court's July 24, 2009 Opinion and Order. At the hearings on the parties' *Daubert* motions on July 28 and 29, Plaintiffs argued several times at length for the Court to reconsider portions of the July 24 Order, and were partly successful with respect to the Court's rulings regarding Plaintiffs' consulting expert Tamzen Macbeth. This Court is now essentially presented with a motion to reconsider its decisions expressed from the bench not to modify the remainder of the July 24 Order.

Plaintiffs' constant motions for reconsideration are improper under the Federal Rules and

they waste the resources of the parties and the Court revisiting issues that have already been pled, in some cases argued, and decided. Judicial decisions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quake AlloyCasting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). As stated earlier, reconsideration is only justified in the event of: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants*, 204 F.3d at 1012. Under this standard, "[p]arties' efforts to revisit issues already addressed or advance arguments that could have been raised in prior briefing will not be considered" by the court. *Lumpkin v. United Recovery Sys., L.P.*, 2009 U.S. Dist. LEXIS 60752, *5 (N.D. Okla. July 16, 2009) (internal quotations omitted); *see also Maul v. Logan County Bd. of County Comm'r*, 2006 U.S. Dist. LEXIS 86934, *3 (W.D. Okla. Nov. 29, 2006). Plaintiffs' Motion does not comply with these established standards. Plaintiffs do not raise an intervening change in the controlling law or previously unavailable evidence. Rather, Plaintiffs press arguments that could have been—and were—discussed in the original briefs.

Plaintiffs' repeated assertions that the Court abused its discretion in striking the Declarations of Plaintiffs' testifying and non-testifying experts ("Declaration(s)") [Motion at 2, 10, and 11] are simply unsupported. If later appealed, a District Court's ruling regarding the admissibility of evidence would be reviewed using an abuse of discretion standard. *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1219 (10th Cir. 2007). To find an abuse of discretion, an appellate court must find "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* at 1219. Broad discretion is available to District Courts in determining the admissibility of evidence. *Woodworker's Supply, Inc. v. Principal Mutual Life Insur. Co.*, 170 F.3d 985, 993 (10th Cir.

1999). Because this Court's Opinion and Order, and its adherence to that Order during the July 28-29 hearings, fell clearly within the bounds of permissible choices in the circumstances and the Court made no clear errors of judgment, Plaintiffs' claims of abuse of discretion are misplaced.

Plaintiffs offer *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003), to contend that it ***may*** constitute a reversible error not to admit certain evidence, such as declarations offered in support of a *Daubert* hearing. [Motion at 10]. Plaintiffs' reliance on *Dodge* is misplaced. In *Dodge*, the appellate court found the trial court erred because it failed to make detailed findings regarding its *Daubert* rulings. *Dodge* at 1225. Specifically, the trial court in *Dodge* admitted the testimony of 3 experts without sufficient consideration of the *Daubert* standards. *Id*. at 1225. The reviewing appellate court held that although a "district court has discretion in how it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function." *Id.* at 1223. (Internal citations omitted).

The instant matter is distinguishable from *Dodge* on several grounds. First, this Court's 17-page Opinion and Order regarding the admissibility of these Declarations was well-considered and directly addressed the intimate details regarding each Declaration.[1] It is clear the Court thoroughly considered Plaintiffs' Declarations before determining the admissibility of each document and did not "avoid" its gatekeeping function. Secondly, in *Dodge* the District Court ***admitted*** the challenged testimony, without "specific findings [made] on the record." *Id*. at 1225. Here, by contrast, the Court carefully considered the evidence, deemed portions ***inadmissible***, and outlined its reasoning in a detailed Opinion and Order. The review of *Dodge* and case law cited throughout the Court's Opinion and Order confirms the Court did not commit "clear error"

[1] Indeed, the Court parsed each Declaration allowing certain portions of some Declarations into evidence, while striking other improper portions. *See, e.g.*, Opinion and Order, Dkt. #2379, at 13, 14, and 17; *see also* July 29, 2009 Hrg. Tr. (not yet available).

or treat the Plaintiffs unjustly in excluding the Declarations. *Servants*, 204 F.3d *at* 1012. In fact, the Court carefully outlined the law regarding the Declarations and came to a reasoned decision after weighing the proper factors and authorities.[2] With no other ground for reconsideration presented by Plaintiffs, there can be no justification for the Court to revisit (again) its well-considered decision made on July 24, 2009. Therefore, reconsideration should be denied.

B. The majority of the Declarations are moot because the of the Court's *Daubert* findings of fact and rulings.

During hearings on July 28 and 29, 2009, after articulating findings of fact, the Court found that the many of the opinions offered by the Plaintiffs' experts were unreliable under the standards developed in *Daubert v. Merrell Pharmaceuticals, Inc*., 509 U.S. 579 (1993). [Dkt. Nos. 2386 and 2387, Minutes of Proceedings]. During the same proceedings, the Court found that the opinions of many of the Defendants' experts were admissible under the *Daubert* standards. [Dkt. Nos. 2386 and 2387]. Since these *Daubert* hearings already occurred, the Court has issued findings and ruled accordingly, and the time for seeking reconsideration of those rulings has passed, it follows that the opinions in Declarations regarding specific *Daubert* motions are moot and reconsideration of the admissibility of Plaintiffs' Declarations is a waste of the Court's time.

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[2] *See, e.g.*, the following cases cited by the Court in the July 24, 2009 Opinion and Order: *Palmer v. Asarco Inc.*, 2007 WL 2254343 (N.D.Okla. Aug. 3, 2007) (Supplemental expert opinions which attempt to strengthen or deepen opinions expressed in an original report are subject to exclusion.); *Aveka L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D.N.C. 2002) (Uncontrolled supplementation could wreak havoc in docket control and amount to unlimited expert opinions.); *Reed v. Smith & Nephew, Inc.*, 527 F. Supp. 2d 1336, (W.D. Okla. 2007) and *City of Owensboro v. Ky. Utilities Co.*, 2008 U.S. Dist. LEXIS 79292 (W.D. Ky. Oct. 8, 2008) (The Court may consider testimony of a non-testifying expert in the context of *Daubert* hearings.); *Celebrity Cruises Inc. v. Essef Corp.*, 434 F. Supp. 2d 169 (S.D.N.Y. 2006) (Reliability of consulting expert's evidence to be considered.); *Daubert*, *supra* (Late-disclosed expert opinions, even in the context of a *Daubert* challenge, are disfavored.); and *Miller v. Pfizer Inc.*, 356 F.3d 1326 (10th Cir. 2004) (While science may afford perpetual revisions, a court may not.).

Specifically, the declarations issued by Dr. Chappell are moot because these declarations were offered in support the Plaintiffs' Motion to Preclude the Testimony of Dr. Charles Cowan and in support of the Plaintiffs' Response to Defendants' Motion to Exclude the Testimony of Roger Olsen [Dkt. Nos. 2072-6, Ex. E and 2198-4, Ex. E, respectively]. The Court denied Plaintiffs' Motion to Preclude the Testimony of Dr. Charles Cowan [Dkt. #2386], while granting the Defendants' *Daubert* motion to exclude Dr. Olsen's testimony regarding principal component analysis. [Dkt. #2386]. Dr. Chappell's Declaration outlined his involvement and opinions specifically related to Dr. Olsen's principal component analysis work. If the bolstering portion of the Declaration provided by Dr. Olsen regarding his own work was deemed impermissible, certainly the bolstering Declaration provided by an undisclosed expert, such as Dr. Chappell, is also impermissible.[3] Pursuant to these rulings, the Plaintiffs' Motion as it relates to the declarations of Dr. Chappell is moot.

Likewise, the two declarations offered by Dr. Loftis aimed at excluding the testimony of Defendants' experts, Drs. Davis, Johnson, Murphy and Cowan [Dkt. Nos. 2064-5, Ex. 4; 2083-4, Ex. C; 2074-4, Ex. C; and 2072-5, Ex. D, respectively], and at supporting Plaintiffs' Response to Defendants' Motions to Exclude the Testimony of Drs. Olsen and Harwood [Dkt. Nos. 2198-4, Ex. D; and 2116-6, Ex. H, respectively] are moot. During the *Daubert* hearings on July 29, 2009, the Court denied the Plaintiffs' motions to exclude Drs. Johnson, Murphy, and Cowan. [Dkt. #2387]. During the same hearings, the Court granted Defendants' Motion to Exclude the Testimony of Roger Olsen. *Id*. Only one day earlier, the Court ruled that Dr. Harwood's testimony was inadmissible as it relates to her work on a biomarker and any IRW-specific health

[3] As discussed *infra*, the Court held that paragraphs 6 and 7 to Olsen's Declaration in support of Plaintiffs' Motion for Partial Summary Judgment [Dkt. #2130, Ex. 116] (the only portions of Dr. Olsen's Declaration which did not harmlessly repeat information in his earlier reports) as inadmissible on July 29, 2009. [Dkt. #2387].

opinions she may offer in this case. [Dkt. #2386]. On August 10, 2009, the Court also denied the Plaintiffs' Motion to exclude the testimony of Dr. Davis. [Dkt. #2447]. Because the motions that Dr. Loftis' Declarations were offered to support have been ruled upon by the Court, each of Dr. Loftis' Declarations are moot.

Similarly, the Declaration and late-disclosed report offered by Dr. Sadowsky in support of Dr. Harwood's work and opinions are moot. [Dkt. Nos. 2116-1, Ex. D; and 2116-2 Ex. E, respectively]. Dr. Sadowsky's "blind test" of Dr. Harwood's work is a test Dr. Harwood failed to administer in contemplation of her expert report, and thus was pure bolstering. This Court has previously made plain its holding that "Rebuttal is not an opportunity for the correction of any oversights in the plaintiffs' case in chief." [Dkt. #1989, pp. 1 – 2] (citations omitted). While Plaintiffs contend Dr. Sadowsky's information would be "helpful" to the Court, that assertion is hollow when the information has been provided without regard to the Federal Rules of Civil Procedure as they relate to discovery or to this Court's scheduling orders. [Dkt. #2443 at 7]. Aside from issuing a new expert report almost a year beyond the required expert reporting deadline in direct contravention of previous orders and without providing Rule 26 disclosures, the subject matter of Dr. Sadowsky's Declaration and report are no longer relevant to this case. During the *Daubert* hearings, this Court found that the work completed by Dr. Harwood was novel and therefore an improper basis for expert testimony. [Dkt. #2387]. Because the Court held Dr. Harwood's work inadmissible, it would necessarily follow that Dr. Sadowsky's Declaration and supplemental report offered in support of Harwood's work are now moot.

The Declarations of Drs. Macbeth and Weidhaas were also offered in support of Plaintiffs' Response to the Defendants' Motion to exclude the testimony of Dr. Harwood. [Dkt. Nos. 2116-4, Ex. F, and 2116-5, Ex. G, respectively]. While a portion of Dr. Macbeth's

Declaration was admitted during the *Daubert* hearing for consideration as it related to Dr. Harwood's work, the support offered by Dr. Macbeth was not sufficient to allow Harwood to overcome the Defendants' *Daubert* challenge. As above, since Dr. Harwood's testimony was deemed inadmissible by the Court, the Declarations offered by Drs. Macbeth and Weidhaas are now moot.

Dr. Olsen submitted three Declarations, in support each of the Plaintiffs' Motion for Partial Summary Judgment and Plaintiffs' unsuccessful *Daubert* challenges to Drs. Davis and Johnson. [Dkt. Nos. 2103-10, Ex. 116; 2064-4, Ex. 3; and 2083-5, Ex. D, respectively]. The Court found that the Olsen Declarations regarding Drs. Davis and Johnson were proper, and did not strike them. These Declarations are not now at issue. Further, the Court granted the Defendants' *Daubert* motion to exclude Dr. Olsen's testimony regarding principal component analysis. [Dkt. #2387]. Therefore, any of Dr. Olsen's opinions offered in support of the Plaintiffs' Motion for Partial Summary Judgment that relate to principal component analysis are moot.

Dr. Engel offered a lengthy Declaration in response to Defendants' Motion to exclude his testimony. [Dkt. #2258-1, Ex. C]. The Court has taken the matter under advisement and has not yet issued its full ruling on the motion. Dr. Engel's 33-page detailed Declaration is akin to a second expert report in response to Defendants' *Daubert* motion. Engel's new Declaration sets forth new opinions on a variety of topics, and frankly admits that it consists of new expert opinion created specifically to respond to the recent deposition of a defense expert and to the points raised in Defendants' *Daubert* motion. *See id.* at ¶6 ("I have studied the Daubert Motion of the Defendants …. I also attended the deposition of Dr. Bierman, the Defendants' modeling expert. The points I will make are based on my experience, the scientific literature, Dr. Bierman's deposition, and the Defendants' motion."). This new expert report comes complete with a lengthy bibliography of the

scientific literature Dr. Engel consulted to draft what is essentially a new expert report. *See id.* at 34-37. Unfortunately for the Court and the parties, this is the fifth time the Court has been forced to consider these issues in writing. [Dkt. Nos. 2241, 2314, 2351, 2443, and this Response]. Notwithstanding that certain portions or all of Dr. Engel's Declaration may be moot, the fact remains these new opinions are untimely and should not be admitted a full year beyond his reporting deadline.

Finally, Dr. Fisher's Declaration offered in response to the Defendants' *Daubert* motion against Dr. Olsen is moot. [Dkt. #2198-5, Ex. H]. The Court, in its Opinion and Order required Dr. Fisher to file a revised Declaration citing the specific portions of his earlier report. [Dkt. #2379 at 17]. Dr. Fisher complied and the Defendants withdrew their opposition to the Declaration, however, the Court ruled during the *Daubert* hearings that Dr. Olsen's challenged work could not withstand a *Daubert* challenge. [Dkt. #2387]. Therefore, Dr. Fisher's Declaration regarding Dr. Olsen is moot as well.

C. The Plaintiffs' experts' Declarations were untimely attempts to supplement and bolster the Plaintiffs' experts' early work.

Through its detailed Opinion and Order, the Court outlined the various reasons each of the Plaintiffs' proffered Declarations were admissible or were not due to their supplemental or bolstering nature. [Dkt. #2379]. Plaintiffs now distract the Court and Defendants with the instant Motion despite the reality that: (i) the Plaintiffs' Motion is improper due to the Court's well-articulated findings, and (ii) the vast majority of the Declarations are moot. The underlying evidence remains that many of the Declarations violated the Rules by offering opinions never presented during discovery or through Rule 26 expert reports.

While Plaintiffs proclaim throughout their Motion that Defendants had the opportunity to

depose and conduct discovery on their non-testifying experts,[4] that assertion is overwhelmed by the fact that Drs. Chappell, Loftis, Macbeth, Sadowsky, Weidhaas, and Engle's opinions offered as Declarations and portions of the opinions of Drs. Olsen, Teaf, and Fisher offered as Declarations were untimely. Plaintiffs attempt to shift the burden from their own duty to disclose the bases for their testifying experts' opinions to somehow create a duty by the Defendants to ferret out all the "consulting" experts who actually performed the work disclosed by Plaintiffs' testifying experts. It is not the responsibility of the Defendants to uncover the expert opinions Plaintiffs plan to offer throughout the course of this litigation.

Rather, Rule 26 and the Court's scheduling orders dictate ***how*** and ***when*** the Plaintiffs' expert opinions must be provided to the Defendants. If Plaintiffs intended to offer expert testimony, such as the testimony offered by Drs. Chappell, Loftis, Macbeth, Sadowsky, and Weidhaas in their declarations, the proper Rule 26 disclosures should have been made long ago.[5] Further, if the Court were to admit expert scientific testimony through Declarations of the non-testifying experts for the purposes of *Daubert* hearings, then in the pursuit of fairness, discovery should be re-opened and the Court and Defendants afforded a meaningful opportunity to assess the level of expertise of these individuals as well as the bases and reliability of their opinions. Defendants engaged in limited discovery of two of Plaintiffs' "consultants" upon determining

[4] Defendants do not disagree that the names of *many* individuals, including Drs. Chappell, Loftis, Macbeth, Sadowsky, and Weidhaas, that helped to prepare the Plaintiffs' scientific case were established during deposition testimony. However, Defendants would like the Court to be aware, for purposes of example, that Camp, Dresser, and McKee, a firm hired by Plaintiffs to conduct scientific work in this case states on their company website they employ over 4,500 individuals in over 100 offices worldwide. [Ex. A, "About CDM" Section of the CDM website, Fact Sheet, http://www.cdm.com/about_cdm/fact_sheet.htm, last visited Aug. 12, 2009].

[5] Indeed, behind the dozens of testifying experts on each side stand a virtual army of assistants, lab technicians, and others who contributed in some way to each testifying experts' work. Plaintiffs cannot seriously be arguing that under such circumstances a party should depose each and every such person lest they be called upon after the expert disclosure deadline to offer new or supplemental opinions.

that the disclosed expert Dr. Harwood could not fully explain what were purportedly her own opinions because they were, in fact, the opinions of consulting experts for whom Plaintiffs did not make full Rule 26 disclosures. *See, e.g.*, *Dura Auto. Sys. V. CTS Corp.*, 285 F.3d 609, 612-13 (7th Cir. 2002) (an expert cannot simply be a conduit or mouthpiece for the opinions of an unproduced expert). Engaging in similar discovery of all of Plaintiffs' previously undisclosed expert declarants now would most certainly disrupt the current litigation schedule and potentially delay the trial, which is fewer than six weeks away.

Most importantly, it is fully within the "broad" discretion of the district court to determine if expert declarations are permissible for the purposes of *Daubert* or Motion for Summary Judgment hearings. *Woodworker's*, 170 F.3d at 993 (citing *Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996)). While the opinions of non-testifying experts ***may*** be permissible in the context of a *Daubert* hearing, those opinions may only be permissible if they were not deemed "new expert submissions" by the Court. *Allgood v. GM*, No. 1:02-cv-1077, 2006 U.S. Dist. LEXIS 70764, *15 (S.D. Ind. Sept. 18, 2006) (citing *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, 2005 U.S. Dist. LEXIS 4566 *(S.D.N.Y. Feb. 14, 2005))*.[6]

[6] In their Motion, Plaintiffs state that Defendants mischaracterized *Allgood.* [Motion at 11, FN 4]. In response to this disputed contention, Defendants first note that the Court did not cite *Allgood* or its factors in the Court's Opinion and Order, therefore it is not clear the Court considered this case as relevant to its decision. The Court, instead, relied upon the four factors for consideration outlined in *Woodworker's Supply, Inc. v. Principal Mutual Life Insurance Company*, 170 F.3d 985, 993 (10th Cir. 1999). Nevertheless, Defendants earlier applied *Allgood* in the context of offering elements the Court should consider in determining whether or not to admit the Declarations. Plaintiffs are correct that in applying these factors Defendants used the word "and" (not an "or" as the Plaintiffs contend should have been used). [Dkt. #2351 at 3]. The relevant portion of *Allgood* which Defendants relied upon for their analyses actually states, "Rule 37 provides in relevant part that a party may not rely on evidence that was not disclosed in violation of Rule 26…unless the party has either a substantial justification or the information is harmless." *Allgood* at *15. Finally, the fact remains that the Plaintiffs' Declarations were neither substantially justified nor harmless under *Allgood*—thus the semantics of an "and" versus an "or" are irrelevant.

In *Allgood*, the subject declarations were deemed admissible because they "either responded to GM's specific *Daubert* criticisms or harmlessly repeat[ed] information provided in the earlier reports." *Id.* at *15. The court in *Allgood* specifically found the "later submissions [did] not amount to the sort of prohibited ambush by an expert." *Id.* at 16. (citing *Salgado v. General Motors Corp.*, 150 F.3d 735, 741-42 n.6. (7th Cir. 1998)). The "prohibited ambush by an expert" contemplated by the Court in *Allgood,* is precisely the sort of ambush Plaintiffs' launched upon Defendants with the untimely Declarations containing new opinions from disclosed and undisclosed experts. *Id*.

In the instant matter, the Court held on multiple occasions, long before the submission of the Plaintiffs' experts' declarations, that, in general, written rebuttal would not be permitted. [Dkt. Nos. 1842 at 2 and 1989 at 2]. Therefore, to the extent that the instant Declarations constituted impermissible rebuttal, they were properly excluded by the Court.[7] Additionally, this Court admitted either the entirety of or portions of the Declarations that it found to harmlessly repeat information provided in the earlier reports (i.e. Brown, Olsen, Teaf, and Fisher). [Dkt. #2379 at 13, 14, 16, and 17].

Plaintiffs further contend throughout their Motion that Defendants' experts are mere "attack experts" and have "elected not to present substantive expert opinions about the issues in the case." [Dkt. #2443 at 5, *see also* Dkt. #2443 at 6 and 11]. The Court has addressed the precise issue of Defendants' experts offering opinions beyond rebuttal to Plaintiffs' experts: "The opinions and theories of defendants' experts will have been fully revealed to plaintiff through expert reports. ***It is unlikely that any attempt by defendants' experts to opine as to some as yet unrevealed theory or opinion will be permitted.***" [Dkt. #1989, p. 2, n. 1] (emphasis

[7] The Court did, in fact, permit Dr. Olsen's critiques of the work of Drs. Davis and Johnson. [Dkt. #2379 at 14].

added). While Plaintiffs may not care for the criticisms offered by Defendants' experts, it is the nature of litigation.

In their Motion, Plaintiffs continue to beat the drum that it is "unfair not to permit" their late-disclosed opinions. [Dkt. 2443 at 6]. But Plaintiffs' predicament is of their own making. Plaintiffs could have sought to amend the schedule much earlier than they did to allow for rebuttal reports. Plaintiffs could have more timely disclosed their own expert case instead of seeking repeated extensions. And, Plaintiffs could have refrained from continually making their expert case a "moving target." District courts are well within their discretion to use scheduling orders to control their dockets. To permit unlimited expert supplementation belies the purpose of Rule 26(a)(2)'s expert disclosure requirements, "to eliminate surprise and provide the opposing party with enough information regarding the expert's opinions and methodology to prepare efficiently for deposition, any pretrial motions and trial." *Cook v. Rockwell Intern. Corp.*, 580 F. Supp. 2d 1071, 1122 (D. Col. 2006). As the Court observed, it would be "fundamentally unfair, given the history of this case, to permit the State to supplement the record with reports of alleged 'consulting experts' whose identity and opinions have been shielded pursuant to Rule 26(b)(4)(B)." [Dkt. #2379 at 7]. The question related to the 'fundamental fairness' of the Declarations has already been closely examined by this Court, and each specific ruling was clearly articulated in keeping with the law. The parties have continued to prepare their cases for the looming trial accordingly and to reconsider the Opinion and Order at this date could disrupt the trial as currently scheduled.

III. CONCLUSION

For these reasons, Defendants respectfully request the Court deny Plaintiffs' Motion for Reconsideration of the Court's July 24, 2009 Opinion and Order [Dkt. #2397] and for any and all other relief to which they may be entitled.

Respectfully submitted,

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